

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BANCO do BRASIL, S.A.,
Plaintiff

vs.

Case No. 1:09-cv-11343-NMG

275 WASHINGTON STREET TRUST,
Defendant

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JUDITH G. DEIN
AT BOSTON, MASSACHUSETTS
ON JUNE 28, 2011

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: The United States District Court for the District of Massachusetts is now in session on June 28, the year 2011, in the matter of Banco do Brasil versus 275 Washington Street Trust, Civil Action No. 2009-11343.

Could counsel please identify themselves for the record.

MR. BERRY: Charles Berry, Arnold & Porter, pro hoc, for the plaintiff and the defendant on the counterclaim, Banco do Brasil.

MR. EISENBERG: Eric Eisenberg, Hinckley, Allen & Snyder for Banco do Brasil, your Honor.

MR. WHITE: Good afternoon, your Honor. Paul White from the law firm of Sugarman, Rogers, Barshak & Cohen.

MR. BENSON: And Bill Benson, Sugarman, Rogers, Barshak & Cohen, for the defendant.

THE COURT: Okay. So we're here on the defendant's motion to compel?

MR. WHITE: Yes, your Honor.

THE COURT: Go ahead. I'll hear you.

MR. WHITE: Your Honor, it is, I submit, a relatively simple motion, but let me start by telling you what is not at issue.

What is not at issue is what Banco do Brasil puts in

1 their opposition, and that is that the trust is somehow relying
2 upon the advice of counsel; the fact that Attorney Scott
3 advised her client in some way and has referenced those
4 communications, or that the bank is relying on those
5 communications. We don't say that at all.

6 This is a motion that seeks to compel the production
7 of attorney-client privileged communications and a limited
8 group, because this is a motion that is based on a specific
9 waiver of the attorney-client privilege, and that is the
10 so-called at-issue waiver. And when an at-issue waiver takes
11 place, the waiver that follows is limited to essentially the --
12 rather the production that follows is limited to the scope of
13 the waiver. So --

14 THE COURT: And you're basing the waiver on the
15 affidavit?

16 MR. WHITE: So we base the waiver entirely on the
17 affidavit of Attorney Scott, and my Brothers say in their
18 papers that it's merely one or two isolated paragraphs. That's
19 really not what happened here at all.

20 The bank moved for summary judgment in this case and
21 it relied upon the affidavit of Attorney Scott, and the two
22 paragraphs that are the key paragraphs that we say give rise to
23 the at-issue waiver are the last two paragraphs. And the
24 entire other paragraphs in her affidavit build up to and form
25 the basis for the statements that are in there.

1 THE COURT: Well, that was my problem, I'll be honest
2 with you. It seemed to me that in the first 27 paragraphs, 26
3 paragraphs, she explains all of these meetings, all of these
4 communications, which we all agree are not privileged, and that
5 they've produced, I presume, the correspondence that's
6 referenced therein, the applications that's referenced therein,
7 the notes of the meeting that are referenced therein. I mean,
8 so those are not the issue.

9 So then you get to the end and it says, sort of in
10 summary, we did a whole lot of work, and then it gives her
11 opinion.

12 Now, I don't know that her opinion matters at all. I
13 don't know if you have expert opinions on whether somebody did
14 due diligence or not. But, you know, we're not up to that.

15 But why isn't she just a fact -- why isn't she just
16 limited to the facts that she's described in her affidavit?

17 MR. WHITE: Well, if she had done that, your Honor, it
18 might have been a different matter, but she clearly didn't do
19 just that. If she had stopped at that point, it might well
20 have been a different matter.

21 I'm not so sure that it would have been, but even if
22 that were the case, the fact is that what she did is she -- and
23 what the bank did is they presented to the Court in connection
24 with an effort to win this case, they presented her the person
25 with all of the knowledge, including the knowledge of the

1 dealings that she had with her own client, and said, "Look at
2 what my client has done. My client did all of these wonderful
3 things. You should find and conclude based upon what I am
4 telling you, that, in fact, my client did everything that you
5 could expect a client to do exercising good faith in trying to
6 meet its burden to open a bank"; and the fact is that once you
7 do that, once you let that cat out of the bag and rely upon a
8 lawyer to make those sorts of representations, and it is
9 fairness that it is absolutely at the root of the doctrine
10 of --

11 (There was a break in the audio.)

12 MR. WHITE: -- waiver, of at-issue waiver.

13 Fairness dictates that the other side be given an
14 opportunity to rebut those statements, and in the circumstances
15 of a communication like this of assertions like this by a
16 lawyer, what that must mean is to determine and investigate and
17 do discovery on what the communications were between the lawyer
18 and the client, because in putting this lawyer forward at this
19 point, that lawyer is speaking for the client; and what the
20 cases say is that if you use an attorney's statements like this
21 as a sword -- this is absolutely a sword -- you cannot then
22 rely upon the attorney-client privilege as a shield to prevent
23 the other side from being able to challenge those assertions
24 and do that necessary discovery to say that isn't the whole
25 story.

1 And, your Honor, there is a case which is absolutely,
2 I think, on point with this case that --

3 THE COURT: But just so I understand, I mean, we have
4 30 paragraphs that give you facts, that just give facts of the
5 meetings that she's had, of the communications that she's had,
6 of the preparations that she did, that her client did, to get
7 this application.

8 Now, you haven't deposed her yet, right?

9 MR. WHITE: We don't want to until we get a ruling on
10 this, your Honor.

11 THE COURT: And then it seems to me, and maybe I
12 misread it, but the summary is then I worked for the 18 months
13 that she's now described to get the regulatory approvals, and
14 this is the work that she did.

15 I don't see anything -- I mean, I have to tell you, I
16 understand that you've argued this with passion, I just am so
17 not seeing where the waiver is that I'm a little surprised.

18 MR. WHITE: It's in Paragraph 32, your Honor. And so
19 you've read --

20 THE COURT: In my opinion --

21 MR. WHITE: In my opinion --

22 THE COURT: So you strike her opinion.

23 MR. WHITE: Banco do Brasil made every reasonable
24 effort in diligently working to obtain the required regulatory
25 approvals in order to open the FSB, and the only way that she

1 can say that, and the basis for that statement, is her work
2 with the client, including all of her communications with the
3 client.

4 And let me, if I may, your Honor, explain what are the
5 types of things that we have questions about --

6 THE COURT: Okay.

7 MR. WHITE: -- because we have some very serious
8 questions in this case.

9 The history that she relates is the following, and so
10 it's not just these two paragraphs. You do have to look at the
11 history. The history that she relates is, and I'm not going to
12 go through every single paragraph, we don't need to do that,
13 but it is essentially as follows: In March 2008, the bank
14 began the approval process. She was retained as counsel and
15 she was the lawyer working with the bank to do that. On
16 October 1st, 2008, approximately six months later, the bank
17 withdrew its application.

18 On January 6th, 2009, the bank filed a new application
19 with a revised business plan, and on March 26th, 2009, the
20 FDIC, in a conference call that she participated in, said that
21 it was returning the application and expressed concerns about
22 the business plan. Those are the facts.

23 And then we have those last two paragraphs, Paragraphs
24 31 and 32. The bank never submitted a new business plan. Why
25 not?

1 Now, this is the lawyer who was working with them
2 and --

3 THE COURT: Well, why do you get the attorney-client
4 communication for that fact?

5 Why don't you take the deposition of the person from
6 the bank who is responsible and you say to him, "Why didn't you
7 submit a new application?"

8 I mean, you're asking for attorney-client privileged
9 documents.

10 Now, you may have an argument -- what I don't know is
11 whether all of these documents are actually privileged, and at
12 what extent. You know, is it just business advice and -- you
13 know, that's a whole other thing. But that's not what the
14 motion is that you have in front of me.

15 The motion that you have in front of me is one that
16 says that these are the strategies, the thought processes, the
17 legal advice that the client gave without even knowing -- I
18 mean, it seems to me that the businessman is going to say -- if
19 the businessman says to you, "I relied on my advice of
20 counsel," you've got a different situation. If he says we
21 didn't do it because the FDIC wanted funding of XY and Z and we
22 were not prepared to do it, or whatever reason he gives, then
23 you have a fact that excludes the attorney's thought process.

24 MR. WHITE: Your Honor, they didn't submit an
25 affidavit from the business person, they submitted an affidavit

1 from the lawyer; and the lawyer is the person who, throughout
2 this process, was representing them and most knowledgeable
3 about it, and that, I submit, is the reason why we have an
4 affidavit from that person. And I submit that what the cases
5 really say is if you choose to use that person --

6 (There was a break in the audio.)

7 MR. WHITE: -- if you choose to use a lawyer, and
8 that's what the McLaughlin case says, even if you dress it up
9 with objective facts, once you do that you have used your
10 attorney as a sword and you cannot use the attorney-client
11 privilege as a shield. You cannot from the moment you do that.

12 They had a choice, your Honor. They could have done
13 exactly what you are suggesting. They could have had that
14 businessperson, or whoever those businesspersons were, and they
15 could have said, "We submitted this application. We had phone
16 calls with the FDIC. This is what the FDIC did. This is what
17 we decided to do."

18 That categorically and completely is not what they
19 have done. They have submitted an affidavit from their
20 attorney with that attorney's opinion about their good faith
21 and how they progressed, and the case law says if you do that
22 you have opened that can of worms.

23 Your Honor, I would ask that the Court read the
24 McLaughlin case which we cite, and the McLaughlin case is a
25 very similar fact pattern to this, and that case was an

1 employment case in which the Secretary of Labor, I believe it
2 said, a case out of the Northern District of Illinois, the
3 Secretary of Labor had filed suit against some clients of an
4 attorney suggesting they had violated some fair labor standard
5 act and some provisions of that act, and the attorney submitted
6 an affidavit saying, "I had discussions with the Secretary of
7 Labor's offices and these are the representations that they
8 made, which caused my client to legitimately rely on them."

9 And the Department then filed a notice of deposition
10 of the attorney with some requests for documents, which were
11 resisted, and that's what gave rise to the motion which led to
12 the decision in the McLaughlin case. And what the Court said
13 was, firstly, that the attorney and the attorney's client made
14 exactly the argument that is being made by the bank here, which
15 is we didn't rely upon any communications between the client
16 and the -- we just relied upon the objective facts of what
17 happened between the Department of Labor, and actually the
18 Department of Labor's representations, and me, and the Court
19 said, "No way, you can't do that," because you cannot put that
20 matter at issue when in fairness what the Department would then
21 want to do is depose your client and ask you questions about
22 what you said to your client.

23 And the court said the following, and it relied upon a
24 decision in another case, the Southwire against Essex case, in
25 which Essex had talked about the fact that the affidavit of

1 their lawyer was limited solely to these objective facts, and
2 the court said, "Even were we to view Essex's objective
3 evidence as entitling it to an inference or prima facie showing
4 of reliance, fairness dictates that Southwire, the plaintiff,
5 be permitted to rebut the showing.

6 The supposed objective subjective dichotomy is, in a
7 way, illusory. Essex's objective evidence, which may include
8 proof of delay, unfulfilled threats or suits and the like, is
9 merely evidence which permits a trier of fact to infer that
10 Essex actually relied on those factors.

11 In short, Essex assert that it relied on Southwire's
12 delay in building the four plans. Southwire says that Essex
13 relied on something else," and this is the important one.
14 "What Essex is arguing here is that Southwire is not entitled
15 to prove what Essex actually relied on, even though the court
16 should be entitled to infer actual reliance from Essex's own
17 proof. The unfairness of Essex's position is manifest."

18 That's exactly what's happening here. The bank says,
19 "We're entitled to put Attorney Scott forward, and the Court
20 should read that affidavit," which I'm sure the court did at
21 the motion for summary judgment stage, "and believe it." But
22 Mr. White is not entitled to now seek to rebut the allegations
23 that are in that affidavit, but asking about what were the
24 communications with your client.

25 Did you say to your client when the FDIC returned that

1 application, "You need to get a move on and file something
2 again"? Did the client say to Attorney Scott, "We've decided
3 we don't want to move forward anymore"? You know, those are
4 the sorts of issues that we say are absolutely at issue in this
5 case, your Honor, and they are being concealed by an affidavit
6 that simply recites objective evidence, and that's what this is
7 about.

8 THE COURT: Why isn't your issue whether or not they
9 decided to go forward because they wanted to or not?

10 Isn't the trial going to be on this point, what the
11 FDIC required?

12 Either you'll rely on her factually or you'll have
13 your own expert on the permitting --

14 (There was a break in the audio.)

15 THE COURT: -- process. But you will have a body of
16 facts that says the -- this was what was provided to the FDIC.
17 The FDIC will say this is sufficient or insufficient, and
18 they've either done it in writing or they've done it orally,
19 all of which is subject to discovery, and then somebody, the
20 fact finder, has to determine whether that's in breach of the
21 contract to exercise due diligence in doing it.

22 I mean, why is -- let's assume that the client said,
23 "I hate the FDIC. I don't want to file another piece of paper.
24 I've had it with them. I am done." So what --

25 MR. WHITE: Well, it wouldn't be that, your Honor, it

1 would be, "I've changed my mind. I don't want to open a bank
2 anymore."

3 THE COURT: But as long as the FDIC -- let's even
4 assume that they say that. If the facts are that they've
5 provided the FDIC with everything that the FDIC asked for, or
6 the decision is not to provide the FDIC with whatever the FDIC
7 wants, don't you ultimately have the fact finder decide whether
8 that's enough or not?

9 Somebody's subjective state of mind is not the
10 criteria here.

11 MR. WHITE: Well, your Honor, everything that you've
12 just said is absolutely true up to a point, and that is that
13 that would be one way of doing this. That is one way of doing
14 it. You could do it that way. My client doesn't have to do it
15 that way. I don't have to try the case that way.

16 The other way of trying the case is to say here's a
17 sophisticated bank represented by a sophisticated lawyer. They
18 submit applications to the FDIC which are not sufficient. The
19 FDIC returns the applications and no further application is
20 filed.

21 Now, why would that be? Why is no further application
22 filed when you have a sophisticated bank that presumably knows
23 how to do this, and you have a sophisticated lawyer and law
24 firm that presumably knows how to advise a client as to how to
25 do it, and I'm entitled to ask a question to the person who is

1 at the heart of this whole problem, that's Attorney Kathleen
2 Scott, and say, "Isn't it true that your client said to you,
3 'We don't want to move forward with this anymore?'"

4 I'm entitled in these situations to ask those
5 questions. They've opened the door to it. I would actually
6 get an adverse inference if they refused to answer that
7 question at trial, I believe, your Honor, but what I'm --

8 THE COURT: No. Wouldn't you get an adverse -- if she
9 says -- you can say to her, "Why didn't you file anything
10 else?" She can answer that.

11 Why does that give you the attorney -- I mean, she's
12 the spokesperson. Somebody conveys something to the FDIC on
13 why we're not continuing.

14 Isn't she the one that does that?

15 MR. WHITE: Your Honor, that's true. Let me answer
16 your question.

17 Firstly, that's true, but what goes to the heart of
18 any analysis, of any examination of whether a party was acting
19 in good faith, is what was in their mind. Sure they can put
20 applications together, but what matters when we are examining
21 whether or not a good faith effort was being made is what was
22 in their mind. It's not just what did they do, it's what were
23 they thinking.

24 Now, we say --

25 THE COURT: But you haven't even asked the client what

1 they were thinking.

2 I mean, disclosure of attorney-client, I have to tell
3 you, I take pretty seriously, all right.

4 MR. WHITE: Your Honor, I do --

5 THE COURT: So you haven't even asked them.

6 MR. WHITE: I do too. I do too. But that's the
7 evidence that they have put before the Court on the summary
8 judgment record. They put before the Court the opinion of an
9 attorney that opens that door, and that, I respectfully
10 suggest, is what the cases say.

11 But, your Honor, I have the impression that I am not
12 convincing you, and I believe I've said --

13 THE COURT: But I'm going to read the cases.

14 MR. WHITE: Your Honor, I believe I've said everything
15 that I can say and I don't want to take any more time of the
16 Court.

17 THE COURT: No, I appreciate that.

18 Let me hear from counsel briefly.

19 MR. BERRY: Your Honor, I think very simply the
20 at-issue doctrine does not apply here because nothing in
21 Ms. Scott's affidavit puts at issue any attorney-client
22 communication. The doctrine that you can't use the
23 attorney-client privilege as a sword and then claim to use it
24 as a shield simply doesn't apply here, because there is no
25 attorney-client privilege whatsoever that is disclosed.

1 Mr. White, although initially he pointed to five
2 particular paragraphs, then he seemed to point to two, and then
3 at the end he said it all comes down to the one paragraph where
4 in a summary statement in her affidavit, Ms. Scott stated that
5 in her opinion the bank, you know, proceeded diligently.

6 She was the person who was charged with interfacing
7 with the regulatory authorities, and the proof of the bank's
8 due diligence and --

9 (There was a break in the audio.)

10 MR. BERRY: -- efforts, in terms of trying to obtain
11 regulatory approval, is in those communications. We have
12 produced 90,000 pages of documents, all of the communications
13 now which were not on the record in the prior summary judgment
14 motion, and Ms. Scott is available --

15 THE COURT: I have more of a question. I mean, I
16 think, seriously, the more complicated question is in what role
17 was she participating, you know, how much of this was an
18 attorney's role and how much of this was a business role.

19 MR. BERRY: As the --

20 THE COURT: But I think that's going to --

21 MR. BERRY: She was the regulatory attorney, your
22 Honor, and that is really not a business role. It's purely an
23 attorney's role, and she was the advocate for the bank in its
24 regulatory applications, and we have produced all of her
25 communications with the regulatory authorities: The FDIC, the

1 OTS and the Federal Reserve Bank.

2 We have also gone to great trouble and expense to
3 segregate out all of the attorney-client privileged documents.
4 There are some 16,000 documents that we have identified.

5 And I think the other point that Mr. White
6 scrupulously avoided discussing is the untimeliness of his
7 motion. This affidavit of Ms. Scott was filed on October 30,
8 2009. There wasn't any suggestion in the briefing on the
9 summary judgment motion that by filing that the door was open
10 to -- that it constituted a waiver of the attorney-client
11 privilege, and it's been eight months since your Honor ruled on
12 the summary judgment motion. And October 1st they served their
13 document request. They knew that we would be going through the
14 effort of segregating out privileged documents.

15 It was only a week or so before Mr. White made his
16 appearance in this matter that they raised for the very first
17 time in a letter of April 29th, 2011, that there was any
18 possibility of waiver of attorney-client privilege. If there's
19 any waiver in this overall situation, I would say it's their
20 waiver of any claim of waiver. They simply cannot wait so long
21 to do that.

22 We cited in our brief the Akamai decision from
23 California which has a remarkably apt statement of exactly the
24 kind of situation we're dealing with here. The court there
25 said if Akamai thought that it had such a waiver in-hand, it is

1 much more likely that they would have asserted it promptly.
2 That delay alone suggests that Mr. Benson did not think in
3 April that the privilege was waived. The period of time they
4 were talking about there was eight months; here we're talking
5 about 19 months since Ms. Scott's affidavit.

6 THE COURT: Do you know this McLaughlin case?

7 MR. BERRY: Excuse me?

8 THE COURT: Do you know the McLaughlin case?

9 MR. BERRY: Yes, I do, and I wanted to address that as
10 well because Mr. White has placed such emphasis on it.

11 That is a distinguishable case because the party that
12 was asserting the privilege there had put in issue the advice
13 of its counsel. It entailed an assessment of what the
14 standards are of the Department of Labor under the Fair Labor
15 Standards Act; and it wasn't simply a question of the party
16 that claimed the privilege asserting good faith reliance on the
17 Department of Labor's interpretation, but the attorney's advice
18 with respect to that interpretation had been put at issue, and
19 that was the basis for the court's decision there.

20 So it's utterly distinguishable because of the
21 proactive assertion of a privileged communication, the advice
22 there that the lawyer gave to the client about the meaning and
23 interpretation of the Department of Labor's standards. So all
24 the cases that they discuss involve some affirmative act of
25 that kind.

1 I'm glad to hear that Mr. White has conceded that we
2 have not put at issue the advice of counsel. A good number of
3 the cases that they cited in their brief depend on that. It's
4 usually in a pleading or in a discovery response or something.
5 It could be an answer to a deposition question, as your Honor
6 posited, that somebody could put in issue the advice of
7 counsel. We don't have --

8 (There was a break in the audio.)

9 MR. BERRY: -- any of that here. Ms. Scott is
10 available to testify. They can ask her what the basis of
11 anything in her affidavit is, but they cannot ask her about
12 privileged communications when the bank has not put at issue
13 any of those.

14 So we're eager to have the full record developed. I'm
15 sure that the landlord's counsel here, having now spent some
16 time looking at the papers that we have produced, have a full
17 understanding of the enormous effort that the bank put into
18 getting the regulatory approval here.

19 THE COURT: Can I ask you about -- and maybe I'm
20 opening a can of worms, but if I understand it, there's a
21 contention that you've translated some documents and they don't
22 have the translations.

23 Is there a way to produce these?

24 MR. BERRY: We have not translated documents, your
25 Honor. We have reviewed with the aid of Portuguese speakers

1 documents prior to production, but it's not like we have some
2 list of documents, which they misunderstand and we've already
3 told them about that, and they can hardly be surprised when
4 they serve an enormously broad document request on a Brazilian
5 bank that a lot of the documents, the internal documents from
6 head office -- this was a huge project that was managed at the
7 very highest levels of the bank and required approvals at the
8 various highest levels -- have documents in Portuguese. That's
9 their responsibility. There's absolutely no obligation on our
10 part to translate them for them or for ourselves, and, you
11 know --

12 THE COURT: I mean, they have copies?

13 I assume some of the operative documents, at least,
14 have been translated.

15 MR. BERRY: We have rough translations of selected
16 documents, but to, you know, produce those rough translations
17 on selected documents would be effectively handing over work
18 product.

19 It's not for us to guide them. I'm frankly eager to
20 get some of these documents on the record so they can show that
21 the bank consistently made every effort to obtain this retail
22 bank approval and federal savings bank approvals, and they will
23 be disappointed to find that that never changed. But --

24 THE COURT: Well, let me just throw out as a
25 suggestion that you may or may not want to take. I have

1 nothing before me, but you don't want to end up in trial with a
2 contest over the accuracy or sufficiency of translations.

3 So to the extent that you can cooperate on that and
4 cost share or whatever you're going to do, let me strongly
5 suggest that that might be an approach, at least for some
6 identifiable set of documents that you all are going to want,
7 because I have been through the trial where we've spent months
8 figuring out which translation is accurate, and it's expensive
9 and unproductive time.

10 MR. BERRY: Right.

11 No, I agree with that, your Honor, and I'm certainly
12 happy to consider some arrangement that we can make with the
13 landlord's counsel. We do very much anticipate renewing the
14 summary judgment motion at the completion of discovery, and I
15 would assume that part of that would be to submit documents,
16 the originals of which are in Portuguese. And, you know, those
17 are required, as I understand the rules, to be officially
18 translated, not just informally as we have, and that's a very
19 considerable expense.

20 So if there's some way that we can, you know, share
21 that, we're certainly happy to entertain that.

22 THE COURT: Just a suggestion. I mean, the Court
23 will -- my guess -- it's not my case, right?

24 It's just been referred to me for this. So I can't
25 speak for Judge Gorton's session, but I would accept

1 agreed-upon translations -- let me put it that way -- whether
2 they were official or not.

3 MR. BERRY: Yes.

4 THE COURT: If they're agreed-upon, I don't really
5 care.

6 MR. BERRY: Right.

7 THE COURT: It's when you have a contest that's a
8 problem.

9 MR. BERRY: No. I think that would be an orderly and
10 efficient way to proceed.

11 THE COURT: All right.

12 MR. BERRY: Well, unless your Honor has any further
13 questions, I would just respectfully submit that --

14 THE COURT: Let me just --

15 MR. BERRY: -- their motion be dismissed in its
16 entirety.

17 THE COURT: Let me just ask you to address the
18 timeliness and then anything else that you'd like to respond
19 to.

20 MR. WHITE: Yes, your Honor.

21 Firstly, my understanding of a waiver is that it means
22 what it says. If you've waived a privilege and that waiver
23 happened at the introduction of Attorney Scott's affidavit, and
24 I was not involved in the case at that time, so I can't speak
25 to --

1 (There was a break in the audio.)

2 MR. WHITE: -- what the thought processes were, but
3 I'm sure it was a very busy time for counsel for the landlord
4 at that time. But if there was a waiver, the waiver happened
5 there and then. You know, the milk doesn't go back into the
6 bottle just because counsel for the other party doesn't raise
7 it immediately, so I think that's the answer to that.

8 I just want to make two very brief points. One is
9 Attorney Berry said that the bank and -- I'm sorry, the
10 landlord can ask Attorney Scott anything they want about the
11 basis for opinion. Well, the point is we can't. This is
12 somebody who is giving an opinion based upon her dealings with
13 her client, and you can bet that when I say "Is part of the
14 basis of your opinion that you dealt with the client and you
15 spoke and you got instructions, and what did they say," there
16 is going to be an objection on the grounds of privilege. So
17 that's simply not true.

18 And the second thing is, your Honor, as you have noted
19 just by your last question here, there is a -- and it's the
20 second limb of the test that we put forward, which is the
21 information available in a reasonable way from any other source
22 and it clearly isn't. We're talking about 100,000 documents,
23 many of which are in Portuguese, and what instead we are
24 seeking to do is ask for a very limited investigation, which
25 will enable the truth to come out, of what it was that was

1 actually done by an American lawyer to an American regulatory
2 agency.

3 So I do think that there's a very significant fairness
4 issue that is raised by this motion, and I greatly appreciate
5 the Court's time this afternoon, and your willingness to read
6 the McLaughlin case and see what it says and the cases cited in
7 it on that issue.

8 THE COURT: I will take the matter under advisement.
9 I will look at the cases. I am obviously inclined to deny the
10 motion, but if it is denied, it would be without prejudice.

11 So I have a vision of what this deposition is going to
12 look like. I could be wrong. I mean, she could claim
13 privilege on a whole lot of things that maybe put a waiver into
14 consideration. You know, I don't know. So if I do deny the
15 motion, it will be without prejudice.

16 MR. WHITE: May I raise one separate issue which
17 Attorney Berry and I have not spoken about, but is always of
18 concern to me when I'm in Federal Court in front of a
19 magistrate judge who becomes very familiar with the case, and
20 I'm sure that that has already happened, given that you
21 rendered that decision, your Honor.

22 THE COURT: I remember it well.

23 MR. WHITE: Yes.

24 If counsel in the case discussed and decided that it
25 made sense for the parties to ask that the case be referred to

1 you for trial, is there a procedure that we should follow to do
2 that?

3 THE COURT: All you need to do is tell Mr. Quinn, and
4 there's a filing that goes on that -- or if all parties
5 consent. You know, obviously I would be happy to take the
6 case, but it's up to you.

7 MR. WHITE: Yes.

8 THE COURT: And --

9 MR. WHITE: Understood, your Honor.

10 THE COURT: And the other thing, let me advise you, if
11 you do summary judgment motions as well, I mean, I would -- you
12 know, we're here and we try a lot of cases, but if you file
13 dispositive motions, you also have the option of consenting
14 just for that motion, if that makes sense, just to avoid the,
15 you know, objection period and you live with whatever that
16 decision is.

17 MR. WHITE: Yes, your Honor.

18 THE COURT: I leave it to you, but just let Mr. Quinn
19 know.

20 MR. WHITE: Thank you very much, your Honor.

21 THE COURT: Okay?

22 MR. EISENBERG: Thank you, your Honor.

23 THE COURT: Thank you.

24 MR. BERRY: Thank you, your Honor.

25

(The hearing was concluded.)

C E R T I F I C A T I O N

I, Karen M. Aveyard, Approved Federal Court Transcriber, do hereby certify that the foregoing transcript, consisting of 26 pages, is a correct transcript prepared to the best of my skill, knowledge and ability from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Karen M. Aveyard

Karen M. Aveyard

August 5, 2011

Date